SHAREN WILSON
Criminal District Attorney
Tarrant County

May 29, 2015

Hon. Ken Paxton
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-12548

Re: Request for Opinion regarding the Michael Morton Act and *Brady v. Maryland*

Dear Mr. Attorney General:

The Texas Commission on Jail Standards requires facilities to "provide for reasonable access, both local and long distance, between an inmate and his/her attorney, family, and friends. This may be on a prepaid or collect basis." 37 TEX. ADMIN. CODE § 291.1(2). Securus Technologies, Inc., pursuant to a contract with Tarrant County, Texas, executed by the County Judge on April 10, 2012, installed an inmate telecommunication system in the County's jail facilities. The contract requires Securus Technologies to provide telecommunication services, to maintain the system, and to make a fixed biannual payment to Tarrant County. At the request of the Criminal District Attorney's Office, the contract between Tarrant County and Securus Technologies also requires Securus Technologies to record telephone calls (except calls to legal counsel) made by inmates from the county's jail facilities. Signs in the County's jail facilities, as well as a recording when a call is made, warn inmates that their conversations are recorded.

Securus Technologies stores the recordings on its servers and is the custodian of all call records and recordings for the County's jail facilities. The Criminal District Attorney's investigators can access the recorded inmate telephone calls without a warrant by using Securus Technologies' proprietary applications, and the Criminal District Attorney's investigators provide the recordings to law-enforcement agencies upon request without a warrant. With regard to applications or other technology which may allow Tarrant County to monitor and record inmate or other administrative telephone

calls, the contract states that the County "retain[s] custody and ownership of all recordings" and grants Securus Technologies a perpetual limited license to compile, store, and access recordings of inmate calls for enumerated purposes.

The State has long had an obligation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and its progeny to disclose evidence known to it that is favorable or material to a defendant's guilt or punishment whether or not the defendant requests it. *See Strickler v. Greene,* 527 U.S. 263, 280 (1999); *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). This duty encompasses both impeachment as well as exculpatory evidence. *Strickler*, 527 U.S. at 280; *Harm*, 183 S.W.3d at 406. Prosecutors have a duty to learn of *Brady* evidence known to others acting on the State's behalf in a particular case. *See Kyles v. Whitley,* 514 U.S. 419, 437-38 (1995). It is irrelevant whether suppression of favorable evidence is willful or inadvertent. *Strickler*, 527 U.S. at 281-82; *Harm*, 183 S.W.3d at 406. A defendant must satisfy three requirements to establish a *Brady* violation: (1) the State suppressed evidence; (2) the suppressed evidence is favorable to the defendant; and (3) the suppressed evidence is material. *Harm*, 183 S.W.3d at 406.

In addition to the State's *Brady* obligations, the Michael Morton Act, found in article 39.14 of the Texas Code of Criminal Procedure, implements mandatory discovery rules for crimes committed on or after January 1, 2014. Article 39.14 now contains the following relevant discovery provisions:

> (a) Subject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this code, as soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of . . . any designated documents, papers, *written or recorded statements of the defendant or a witness*, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, . . . that constitute or contain evidence material to any matter involved in the action and *that are in the possession, custody, or control of the state or any person under contract with the state.*
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> * * *
>
> (h) Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information *in the possession, custody, or control of the*

> *state* that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

TEX. CODE CRIM. PROC. art. 39.14(a), (h) (emphasis added).

There is no caselaw and no opinion of the Texas Attorney General construing the State's duties regarding the discoverability under *Brady* or the Michael Morton Act of recordings of jail-inmate telephone calls that are made and stored by a private company as part of its contract with the county to provide telecommunication services and maintenance in the county's jail facilities and that can be accessed without a warrant by the prosecutor's office. In order to ensure full compliance with the requirements of *Brady* and the Michael Morton Act, the Criminal District Attorney of Tarrant County, Texas, requests that the Texas Attorney General issue an opinion on the following questions:

(1) Does *Brady* require the Criminal District Attorney's Office to review recordings of jail-inmate telephone calls that are created and stored on servers owned by a private company as part of its contract with the county to provide telecommunication services and maintenance in order to determine whether such recordings contain exculpatory or impeachment evidence if the Criminal District Attorney's Office has not otherwise exercised its ability to access the recordings without a warrant?

(2) Under the Michael Morton Act, are recordings of jail-inmate telephone calls that are created by and stored on servers owned by a private company as part of its contract with the county to provide telecommunication services and maintenance considered to be in the possession, custody, or control of the State or a person under contract with the State if the Criminal District Attorney's Office does not exercise its ability to access the recordings?

(3) For purposes of the Michael Morton Act, does the ability of the Criminal District Attorney's Office to access without a warrant recordings of jail-inmate telephone calls, which are created and stored by a private company under a contract with the county, equate to possession, custody, or control of the recordings by the State or a person under contract with the State?

A brief in support of this request is attached.

We respectfully request your opinion regarding application of *Brady* and the Michael Morton Act in the circumstances described above.

Respectfully submitted,

/s/ Sharen Wilson
SHAREN WILSON
CRIMINAL DISTRICT ATTORNEY
TARRANT COUNTY, TEXAS

BRIEF IN SUPPORT OF
REQUEST FOR OPINION OF THE
TEXAS ATTORNEY GENERAL

Discoverability under *Brady* and the Michael Morton Act of recordings of jail-inmate telephone calls that are created and stored by a private company as part of its contract with the county to provide telecommunications services and maintenance and to which the Criminal District Attorney's Office has access without a warrant.

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QUESTIONS PRESENTED

There is no caselaw and no opinion of the Texas Attorney General construing the State's duties regarding the discoverability under *Brady*[1] or the Michael Morton Act of recordings of jail-inmate telephone calls that are made and stored by a private company as part of its contract with the county to provide telecommunication services and maintenance in the county's jail facilities and that can be accessed without a warrant by the prosecutor's office. In order to ensure full compliance with the requirements of *Brady* and the Michael Morton Act, the Criminal District Attorney of Tarrant County, Texas, requests that the Texas Attorney General issue an opinion on the following questions:

(1) Does *Brady* require the Criminal District Attorney's Office to review recordings of jail-inmate telephone calls that are created and stored on servers owned by a private company as part of its contract with the county to provide telecommunication services and maintenance in order to determine whether such recordings contain exculpatory or impeachment evidence if the Criminal District Attorney's Office has not otherwise exercised its ability to access the recordings without a warrant?

(2) Under the Michael Morton Act, are recordings of jail-inmate telephone calls that are created by and stored on servers owned by a private company as part of its contract with the county to provide telecommunication services and maintenance considered to be in the possession, custody, or control of the State or a person under contract with the State if the Criminal District Attorney's Office does not exercise its ability to access the recordings?

(3) For purposes of the Michael Morton Act, does the ability of the Criminal District Attorney's Office to access without a warrant recordings of jail-inmate telephone calls, which are created and stored

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

by a private company under a contract with the county, equate to possession, custody, or control of the recordings by the State or a person under contract with the State?

BRIEF OF THE QUESTIONS PRESENTED

I. Relevant Facts

The Texas Commission on Jail Standards requires facilities to "provide for reasonable access, both local and long distance, between an inmate and his/her attorney, family, and friends. This may be on a prepaid or collect basis." 37 TEX. ADMIN. CODE § 291.1(2). Securus Technologies, Inc., pursuant to a contract with Tarrant County, Texas, executed by the County Judge on April 10, 2012, installed an inmate telecommunication system in the County's jail facilities. The contract requires Securus Technologies to provide telecommunication services, to maintain the system, and to make a fixed biannual payment to Tarrant County. At the request of the Criminal District Attorney's Office, the contract between Tarrant County and Securus Technologies also requires Securus Technologies to record telephone calls (except calls to legal counsel) made by inmates from the county's jail facilities. Signs in the County's jail facilities, as well as a recording when a call is made, warn inmates that their conversations are recorded.

Securus Technologies stores the recordings on its servers. The Criminal District Attorney's investigators can access the recorded inmate telephone calls without a warrant by using Securus Technologies' proprietary applications, and the Criminal District Attorney's investigators provide the recordings to law-enforcement agencies upon request without a warrant. The contract states that Tarrant County "retain[s] custody and

ownership of all recordings" and grants Securus Technologies a perpetual limited license to compile, store, and access recordings of inmate calls for enumerated purposes.

II. *Brady v. Maryland*

The State has long had an obligation under *Brady* and its progeny to disclose evidence known to it that is favorable or material to a defendant's guilt or punishment whether or not the defendant requests it. *Strickler v. Greene,* 527 U.S. 263, 280 (1999); *Harm v. State*, 183 S.W.3d 403, 406 (Tex. Crim. App. 2006). This duty encompasses both impeachment and exculpatory evidence. *Strickler*, 527 U.S. at 280; *Harm*, 183 S.W.3d at 406. Prosecutors have a duty to learn of *Brady* evidence known to others acting on the State's behalf in a particular case. *See Kyles v. Whitley,* 514 U.S. 419, 437-38 (1995); *Harm*, 183 S.W.3d at 406. It is irrelevant whether suppression of favorable evidence is willful or inadvertent. *Strickler*, 527 U.S. at 281-82; *Harm*, 183 S.W.3d at 406. A defendant must satisfy three requirements to establish a *Brady* violation: (1) the State suppressed evidence; (2) the suppressed evidence is favorable to the defendant; and (3) the suppressed evidence is material. *Harm*, 183 S.W.3d at 406.

Under the circumstances presented, *Brady* should be inapplicable to the recordings of jail-inmate telephone calls in question here. The situations in which *Brady* applies involve the discovery after trial of information that was known to the prosecution but unknown to the defense. *United States v. Augurs*, 427 U.S. 97, 103 (1976). A defendant cannot establish a *Brady* claim based on withheld evidence if he already has knowledge of it. *See Williams v. Scott,* 35 F.3d 159, 163 (5th Cir. 1994) ("A *Brady* violation does not arise if the defendant, using reasonable diligence, could have obtained the information");

Blackmon v. Scott, 22 F.3d 560, 564-65 (5th Cir. 1994) ("The state is not required to furnish a defendant with exculpatory evidence that is fully available to the defendant or that could be obtained through reasonable diligence"). The State has no duty of disclosure under *Brady* if the defendant is actually aware of the exculpatory evidence or could have accessed it from other sources. *See Harm*, 183 S.W.3d at 407; *Havard v. State*, 800 S.W.2d 195, 204-05 (Tex. Crim. App. 1989).

Here, as a matter of simple logic, a criminal defendant knows about the existence and content of his own telephone conversations because he is present when they occur. *See Havard*, 800 S.W.2d at 204. A defendant is also aware from signs posted in the County's jail facilities and a recording when a call is made that his conversations are recorded. The defendant's counsel ought to be aware that his client's telephone conversations have been recorded because counsel must provide his telephone number to the County so that attorney-client calls will not be recorded. *Brady* simply does not apply to statements made during a defendant's own telephone conversations. *See, e.g.*, *Hayes v. State*, 85 S.W.3d 809, 814-15 (Tex. Crim. App. 2002) (finding *Brady* inapplicable where prosecution did not disclose letter written by the defendant to his mother-in-law stating that he was "sorry for what he [had] done"); *Havard*, 800 S.W.2d at 205 (overruling an alleged *Brady* error involving the defendant's prior statement to police).

Likewise, with regard to recordings of jailhouse telephone conversations of an incarcerated witness in a defendant's case, the defense ought to be aware of the possibility that such recordings exist. As previously discussed, jail inmates are advised that their telephone conversations are recorded, and attorneys must provide a telephone

number so that attorney-client calls are not recorded. *Brady* protects a defendant from the nondisclosure of evidence discovered after trial that was known to the prosecution but unknown to the defense. *See Augurs*, 427 U.S. at 103. The possible existence of the recordings in question is not unknown to the defense prior to trial. Although defense counsel does not have direct access to such recordings and is not privy to the contents of such recordings, nothing prevents counsel from requesting copies of the recordings if he wishes to review them. As such, *Brady* should not require the State to access and review the recordings, if any, of a witness who has been incarcerated in the County's jail facilities.

Furthermore, the State's duties under *Brady* should not extend to the recordings of jail-inmate telephone calls unless and until the State accesses them because the recordings are not otherwise in the possession of the State or of a law-enforcement agency participating in the investigation or prosecution of the case. Securus Technologies is required to make and store the recordings as part of its contract signed by the County Judge on behalf of Tarrant County. The commissioner's court of a county has the sole authority to make contracts binding on the county, unless otherwise specifically provided by statute. *Anderson v. Wood*, 137 Tex. 201, 204, 152 S.W.2d 1084, 1085 (1941). A county's commissioners have the authority to award a contract to provide the mandated telephone service to jail inmates confined in the county's facilities. *See* Letter Opinion No. 97-032 (1997) (county's commissioners, not the sheriff, have authority to

award a contract for inmate phone services).[2] Although the contract's provisions for recording and storing jail-inmate telephone calls were included in the contract at the request of the Criminal District Attorney's Office, the Criminal District Attorney did not sign the contract between Tarrant County and Securus Technologies and should not be considered a party to it. *See Pepe Int'l Dev. Co. v. Pub Brewing Co.,* 915 S.W.2d 925, 931 (Tex. App.—Houston [1st Dist.] 1996, no writ) (holding that non-signatories were not parties to the contract and thus had no right to compel arbitration under the contract).

Although Tarrant County is a political subdivision of the State of Texas, the County should not be considered the same as "the State" for criminal-justice purposes such as *Brady*. The elected Criminal District Attorney represents the State in all criminal matters before Tarrant County's district and county courts and in appeals therefrom. *See* TEX. LOC. GOV'T CODE § 44.320(a); *see also* TEX. CODE CRIM. PROC. art. 2.01. "The State," as that term is used in criminal jurisprudence, refers to the machinery of criminal prosecution, and it should not be expanded to include an entity that is not involved in a criminal investigation and prosecution. *See Ex parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012) ("the 'State' includes, in addition to the prosecutor, other lawyers and employees in his office and members of law enforcement connected to the investigation and prosecution of the case"). Neither Tarrant County nor Securus Technologies is involved in the investigation or prosecution of criminal cases. Securus Technologies

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[2] "A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the A.G. unless and until it is modified or overruled by a subsequent letter opinion, a formal A.G. Opinion, or a decision of a court of record." 19 TEX. REG. 8089 (1994).

creates and stores recordings of all jail-inmate telephone calls (with the exception of calls to legal counsel) regardless of whether the recorded conversation contains information of potential value to a criminal investigation or prosecution, and the Criminal District Attorney's Office will likely be unaware of the contents of the recordings unless it chooses to access them. Courts have refused to impute knowledge or possession to prosecutors of information held by government agencies that were not involved in the investigation or prosecution at issue. *See, e.g.*, *United States v. Merlino*, 349 F.3d 144, 153-54 (3rd Cir. 2003) (no imputation of tape recordings made by Bureau of Prisons of immaterial phone calls by cooperating witnesses over a two-year period; prosecutor's office had no *Brady* duty to learn of information possessed by other government agencies that had no involvement in the investigation or prosecution of the case); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996) (*Brady* does not impose duty on prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue); *United States v. Meregildo*, 920 F. Supp.2d 434, 440 (S.D.N.Y. 2013) ("[t]he constructive knowledge of the prosecutor is not limitless," and "does not encompass every agency and individual within the federal government"); *State v. Moore*, 240 S.W.3d 324, 326-28 (Tex. App.—Austin 2007, pet. ref'd) (finding no basis to impute to Travis County prosecutors any knowledge of attorney general's investigation into witness' improper activities or to fault the prosecutor for failing to discover the existence of the investigation before trial). Texas courts have held that *Brady* does not require the State to independently seek out exculpatory evidence on behalf of the defendant. *See Harm*, 183 S.W.3d at 407; *In re State ex rel. Munk*, 448

S.W.3d 687, 692 (Tex. App.—Eastland 2014, orig. proceeding). For example, *Brady* does not require the State to obtain information requested by a defendant from a criminal history database that it has not already obtained. *See, e.g.*, *Munk*, 448 S.W.3d at 692; *In re Watkins*, 369 S.W.3d 702, 706 (Tex. App.—Dallas 2012, orig. proceeding).

It is true that the Criminal District Attorney's investigators can access the recordings stored on Securus Technologies' servers without a warrant. However, as the Eleventh Court of Appeals explained in *Munk*, the ability to access information does not necessarily equate to possession of all the information that can potentially be accessed:

> Individuals have access to a plethora of information (and images) via the internet, including matters that are inherently criminal in nature. However, the fact that one may have access to information does not mean that the person has possession of all information that he or she could potentially access. Furthermore, access to information does not equate to knowledge that the information exists, which is a component under *Brady*.

448 S.W.3d at 692-93.

The State should not be considered to be in possession or constructive possession of the recordings stored by Securus Technologies merely because the Criminal District Attorney's Office has the ability to access the recordings without a warrant. The recordings should not be deemed to be in the State's possession or constructive possession unless and until the Criminal District Attorney's Office or a law-enforcement agency participating in the investigation or prosecution of the case actually accesses or otherwise makes use of them. Compelling the State to access and review every recorded jailhouse telephone conversation of a defendant or witness stored on Securus Technologies' servers in order to determine whether they contain *Brady* material would

be unduly and needlessly onerous, especially given that a defendant and his attorney should be aware of the possibility that such recordings exist and the Criminal District Attorney's Office has no greater knowledge than the defense of whether the recordings contain *Brady* information.

The Criminal District Attorney is by no means seeking to lessen its duty to turn over *Brady* material contained in a recording which it, or a law-enforcement agency participating in the criminal investigation or prosecution, has accessed. However, *Brady* should not be interpreted to require the Criminal District Attorney's Office to seek out and review recordings held by agencies or companies that are that are not involved in the investigation or prosecution of the criminal case merely because it has the ability to access them on the servers of a private company under contract with the County without a warrant. *See, e.g.*, *Merlino*, 349 F.3d at 153-54; *Morris*, 80 F.3d at 1169; *Meregildo*, 920 F. Supp.2d at 440. Although the contract between Tarrant County and Securus Technologies states that the County "retain[s] custody and ownership of all recordings" and grants Securus Technologies a perpetual limited license to compile, store, and access the recordings for enumerated purposes, neither entity is involved in the investigation or prosecution of a criminal case. *See Ex parte Miles*, 359 S.W.3d at 665 ("the 'State' includes, in addition to the prosecutor, other lawyers and employees in his office and members of law enforcement connected to the investigation and prosecution of the case).

Under the circumstances presented, the State's *Brady* obligations should not be deemed to extend to the recordings at issue because the recordings are not in the possession or constructive possession of the State unless the Criminal District Attorney's

Office exercises its ability to access them. To conclude that the State is required to access and review all recordings of jail-inmate telephone conversations potentially pertaining to a defendant's case which are stored on Securus Technologies' servers as part of its contract with Tarrant County in order to determine if they contain *Brady* material would exceed the requirements of *Brady* by requiring the State to independently seek out exculpatory evidence on behalf of the defendant. *See Munk*, 448 S.W.3d at 692 ("requiring the State to conduct criminal history searches exceeds the requirements of *Brady* because the State would be required to independently seek out exculpatory evidence on behalf of the defendant").

III. The Michael Morton Act

Prior to the enactment of the Michael Morton Act, the Tarrant County Criminal District Attorney's Office, along with nearly all Texas criminal district attorney's offices and district attorney's offices, voluntarily maintained an open-file policy which allowed criminal defense counsel more expansive discovery than that provided by statute. In 2013, the Texas Legislature passed S.B. 1611, the Michael Morton Act, to implement mandatory discovery rules for crimes committed on or after January 1, 2014. *See* Act of May 14, 2013, 83rd Leg., R.S., ch. 49 (S.B. 1611), §§ 1-4. The Act, which is found in article 39.14 of the Texas Code of Criminal Procedure, contains the following relevant discovery provisions:

> (a) Subject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this code, as soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of . . . any designated documents, papers,

> *written or recorded statements of the defendant or a witness*, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, . . . that constitute or contain evidence material to any matter involved in the action and *that are in the possession, custody, or control of the state or any person under contract with the state*.
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> (h) Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information *in the possession, custody, or control of the state* that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

TEX. CODE CRIM. PROC. art. 39.14(a), (h) (emphasis added).

Construction of the Michael Morton Act should seek to effectuate the collective intent or purpose of the legislators who enacted it. *Yazdchi v. State*, 428 S.W.3d 831, 837-38 (Tex. Crim. App. 2014), *cert. denied*, 135 S. Ct. 1158 (2015). The inquiry focuses on the statute's literal text, and its words and phrases must be read in context and construed according to the rules of grammar and common usage unless they have acquired technical or particular meaning. *Id.* When statutory language is clear and unambiguous, its plain meaning is given effect unless to do so would lead to absurd consequences that the legislature could not have possibly intended. *Id.* at 837-38. Resort to extra-textual factors is had only when the statutory language is ambiguous, *i.e.*, when it may be understood by reasonably well-informed persons in two or more different senses. *Id.* at 838.

As previously discussed, Securus Technologies is required to make and store the recordings of jail-inmate telephone calls as part of its contract executed by the County Judge for Tarrant County. The issue presented here is whether the State or a person

under contract with the State has possession, custody, or control of such recordings by virtue of the fact that the Criminal District Attorney's Office requested that the contract include provisions requiring Securus Technologies to create and store the recordings and can access the recordings without a warrant. *See* TEX. CODE CRIM. PROC. art. 39.14(a), (h).

A county's commissioners court is the acting governing body of the county. *Anderson*, 137 Tex. at 204, 152 S.W.2d at 1085; *see* TEX. CONST. art. V, § 18(b). It is the general business and contracting agency of the county, and it alone has authority to make contracts binding on the county, unless otherwise specifically provided by statute. *Id.* A county's commissioners have the authority to award a contract to provide the mandated telephone service to jail inmates confined in the county's facilities. *See* Letter Opinion No. 97-032 (1997) (county's commissioners, not the sheriff, have authority to award contract for inmate phone services). Although Tarrant County required its contract with Securus Technologies to provide for recording and storing jail-inmate telephone calls because the Criminal District Attorney's Office requested it, the contract is between Tarrant County and Securus Technologies; the Criminal District Attorney did not sign the contract and should not be considered a party to it. *See Pepe Int'l Dev. Co.*, 915 S.W.2d at 931 (holding that non-signatories were not parties to the contract and thus had no right to compel arbitration under the contract).

Although Tarrant County is a political subdivision of the State of Texas, the County is not the same as "the State" for criminal-justice purposes such as the Michael Morton Act. The elected Criminal District Attorney represents the State in all criminal

matters before Tarrant County's district and county courts and in appeals therefrom. TEX. LOC. GOV'T CODE § 44.320(a); *see* TEX. CODE CRIM. PROC. art. 2.01. "The State," as that term is used in criminal jurisprudence, refers to the machinery of criminal prosecution, and it should not be expanded to include an entity that is not involved in the investigation and prosecution of the criminal case. *See Ex parte Miles*, 359 S.W.3d at 665 ("the 'State' includes, in addition to the prosecutor, other lawyers and employees in his office and members of law enforcement connected to the investigation and prosecution of the case"). Securus Technologies is under contract with Tarrant County, not "the State" as that term is defined with regard to criminal investigation and prosecution. *See id.* Moreover, Securus Technologies cannot be considered "the State" because it is a private company that routinely records all jail-inmate telephone calls, not only those with value to a criminal investigation or prosecution, and it does not participate in the investigation or prosecution of criminal cases.

Information gathered or items created by Securus Technologies as the result of its contract with Tarrant County should not be considered to be in the possession, custody, or control of the State or of a person under contract with the State for purposes of the Michael Morton Act unless and until the Criminal District Attorney's Office or another law-enforcement agency connected to the investigation and prosecution of a criminal case actually accesses the recordings. Neither Tarrant County nor Securus Technologies is involved in the investigation or prosecution of criminal cases. Courts have refused to impute knowledge or possession to prosecutors of information held by government agencies that were not involved in the investigation or prosecution at issue. *See, e.g.*,

Merlino, 349 F.3d at 153-54 (no imputation of tape recordings made by Bureau of Prisons of immaterial phone calls by cooperating witnesses over a two-year period; prosecutor's office had no *Brady* duty to learn of information possessed by other government agencies that had no involvement in the investigation or prosecution of the case); *Morris*, 80 F.3d at 1169 (*Brady* does not impose duty on prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue); *Meregildo*, 920 F. Supp.2d at 440 ("[t]he constructive knowledge of the prosecutor is not limitless," and "does not encompass every agency and individual within the federal government"). As with *Brady*, the State should not be required under the Michael Morton Act, which is philosophically based on *Brady*, to independently seek out evidence on behalf of the defendant. *See Harm*, 183 S.W.3d at 407; *Munk*, 448 S.W.3d at 692. For example, former article 39.14 did not require the State to obtain information requested by the defense from a criminal history database that the State had not already obtained. *See, e.g.*, *Munk*, 448 S.W.3d at 692; *In re Watkins*, 369 S.W.3d at 706.

It is true that the Criminal District Attorney's investigators can access the recordings stored on Securus Technologies' servers without a warrant. However, as the Eleventh Court of Appeals explained in *Munk*, the ability to access information does not necessarily equate to possession of all the information that can potentially be accessed:

> Individuals have access to a plethora of information (and images) via the internet, including matters that are inherently criminal in nature. However, the fact that one may have access to information does not mean that the person has possession of all information that he or she could potentially

> access. Furthermore, access to information does not equate to knowledge that the information exists, which is a component under *Brady*.

448 S.W.3d at 692-93. The State should not be considered to have possession, custody, or control over the recordings created and stored by Securus Technologies as part of its contract with Tarrant County unless and until the Criminal District Attorney's Office or other law-enforcement agency exercises its ability to access them.

Compelling the State to access and review every recorded jailhouse telephone conversation of a defendant or witness stored on Securus Technologies' servers in order to determine whether they contain information falling within the discovery mandates of the Michael Morton Act would be unduly and needlessly onerous. Criminal defendants and their attorneys are equally aware that jail-inmate telephone calls are recorded, and defense counsel is free to seek discovery of the recordings through a specific request if he wishes to review them.

The Michael Morton Act should not be interpreted to require the Criminal District Attorney's Office to seek out and review recorded jail-inmate telephone calls which are held by agencies or companies that are neither employed by the prosecutor's office nor members of law enforcement involved in the investigation or prosecution of the criminal case and which the Criminal District Attorney's Office has not chosen to access. *See, e.g.*, *Merlino*, 349 F.3d at 153-54; *Morris*, 80 F.3d at 1169; *Meregildo*, 920 F. Supp.2d at 440. Although the contract between Tarrant County and Securus Technologies states that the County "retain[s] custody and ownership of all recordings" and grants Securus Technologies a perpetual limited license to compile, store, and access the recordings for

enumerated purposes, neither entity is involved in the investigation or prosecution of a criminal case, and neither entity can be considered "the State" or a person under contract with "the State." *See Ex parte Miles*, 359 S.W.3d at 665 ("the 'State' includes, in addition to the prosecutor, other lawyers and employees in his office and members of law enforcement connected to the investigation and prosecution of the case). The contract between Securus Technologies and Tarrant County requiring the routine recording of all jail-inmate telephone calls, and which serves other purposes such as providing telecommunication services and maintenance in the County's jail facilities, is too remote from the investigative and prosecutorial functions of the State in a criminal case to deem the State or a person under contract with the State to be in possession, custody, or control of the resulting recordings.

IV. Conclusion

The Criminal District Attorney recognizes that it must not ignore information that can fairly be considered to fall within its obligations of disclosure under *Brady* or the Michael Morton Act. However, the State should not be required to access and review voluminous recordings of jailhouse telephone calls of a defendant or witness to determine if they contain information falling within *Brady* or the Michael Morton Act unless the Criminal District Attorney or other law-enforcement agency involved in the investigation or prosecution of the case has accessed the recordings.

> An individual prosecutor is presumed . . . to have knowledge of all information gathered in connection with his office's investigation of the case and indeed "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Nonetheless, knowledge on the part of persons employed by a different

> office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt "a monolithic view of the government" that would "condemn the prosecution of criminal cases to a state of paralysis."

United States v. Avellino, 136 F.3d 249, 255 (2nd Cir. 1998) (citations omitted).

The Criminal District Attorney seeks an opinion from the Attorney General rather than waiting to litigate the issues as they arise so that the State can meet its obligations under *Brady* and the Michael Morton Act at the time it carries out its duties of discovery. The questions presented do not relate to any specific case now pending. An opinion on the questions presented is critical to ensuring full compliance with the discovery requirements set forth by *Brady* and the Michael Morton Act.

We respectfully request your opinion regarding application of *Brady* and the Michael Morton Act in the circumstances described above.

Respectfully submitted,

/s/ Sharen Wilson
SHAREN WILSON
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TARRANT COUNTY, TEXAS